92-1795

No._____

MAY 11 1993

In The

Supreme Court of the United States

October Term, 1992

NICHOLAS ALFRED RATTENNI,
also known as Alfred Nicholas Rattenni and
A-1 COMPACTION, INC.,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in determining whether to admit into evidence an out-of-court statement of an alleged co-conspirator pursuant to Rule 801(d)(2)(E), Fed. R. Evid., a district court may rely solely upon the content of that statement to determine the existence of, and connection of a defendant to, the conspiracy, or must some evidence extrinsic to the statement be presented?
2. Whether, if a district court may not rely solely upon the content of an out-of-court statement of an alleged co-conspirator in determining whether to admit that statement into evidence pursuant to Rule 801(d)(2)(E), Fed. R. Evid., and extrinsic evidence has been presented, the district court must weigh and evaluate the extrinsic evidence independently from the out-of-court statement sought to be admitted?
3. Whether, if a district court may not rely solely upon the content of an out-of-court statement of an alleged co-conspirator in determining whether to admit that statement into evidence pursuant to Rule 801(d)(2)(E), Fed. R. Evid., and the district court must independently weigh and evaluate the extrinsic evidence, the court must find that the quantum of extrinsic evidence is "fairly incriminating" or "substantial?"

LIST OF PARTIES AND RULE 29.1 LIST

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

Petitioner A-1 Compaction, Inc. has no parent companies or nonwholly owned subsidiaries to list pursuant to Rule 29.1.

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REASONS FOR GRANTING THE WRIT

THIS CASE INVOLVES THE IMPORTANT QUESTION, AS TO WHICH THERE IS A SERIOUS CONFLICT AMONG THE CIRCUITS, OF WHETHER A DISTRICT COURT CAN ADMIT INTO EVIDENCE A CO-CONSPIRATOR'S OUT-OF-COURT STATEMENT WITHOUT ADEQUATE EXTRINSIC EVIDENCE, A QUESTION LEFT UNANSWERED BY THIS COURT IN *BOURJAILY v. UNITED STATES*, 483 U.S. 171 (1987) 10

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In The

Supreme Court of the United States

October Term, 1992

NICHOLAS ALFRED RATTENNI,
also known as Alfred Nicholas Rattenni and
A-1 COMPACTION, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit, filed and entered on February 10, 1993, will not be officially reported at the direction of that court.[1] The opinion appears in Appendix A at A1 - A7.

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[1] "The fact that a court of appeals has ordered that its opinion not be published is no bar to Supreme Court review." R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE (6th ed. 1986), § 2.1, p. 40, n.2, *citing*, *Transamerican Freight Lines v. Brada Miller Freight Systems*, 423 U.S. 28, 34 (1975).

The Summary Order affirmed the judgments of conviction, entered July 17, 1992, in the United States District Court for the Southern District of New York (Goettel, J.), of Petitioners Nicholas Alfred Rattenni (also known as Alfred Nicholas Rattenni) and of A-1 Compaction, Inc. (hereinafter, "A-1") for violating 18 U.S.C. §§ 2, 371 and 666.

Following the close of the trial and the rendering of verdicts, Petitioners moved the district court pursuant to Rules 29 and 33, Fed. R. Crim. P., for dismissal and a new trial, respectively, both of which were denied. On July 2, 1993, oral proceedings on the motion were transcribed, and only selected pertinent portions are included in Appendix B at A8 - A11. The district court rendered no written opinion.

JURISDICTION

Petitioners were convicted after jury trial in the United States District Court, Southern District of New York, of violations of 18 U.S.C. §§ 2 and 666 and conspiracy in violation of 18 U.S.C. § 371. Judgment was entered on July 17, 1992, and notices of appeal were timely filed on that date.

The judgment of the Second Circuit Court of Appeals affirming the judgments below was entered on February 10, 1993. In accordance with Rule 13.1 of this Court, this petition is filed within 90 days after the date of entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988) because the judgment was rendered by a United States Circuit Court of Appeals in a criminal case.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

A. Constitutional Provisions

Fifth Amendment:

> "No person shall... be deprived of life, liberty, or property without due process of law...."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...."

B. Statutory Provisions

18 U.S.C. § 2:

> " **Principals**
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C. § 371:

> "Conspiracy to commit offense or to defraud United States
>
> If two or more persons conspire either to commit any offense against the United States,

or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *"

18 U.S.C. § 666:

"Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstances described in subsection (b) of this section exists —

* * *

(2) corruptly gives, offers or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant,

contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

C. Federal Rules of Evidence Involved

Rule 104(a):

"**Preliminary Questions**

(a) Questions of admissibility generally.

Preliminary questions concerning ... the admissibility of evidence shall be determined by the court .... In making its determination it is not bound by the rules of evidence except those with respect to privileges."

Rule 801(d)(2)(E):

"(d) A statement is not hearsay if -

* * *

(2) Admission by party-opponent. The statement is offered against a party and is ... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

Rule 802:

"Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Rule 805:

"Hearsay within Hearsay

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

STATEMENT OF THE CASE

The following statement of facts summarizes evidence which prompted the district court to voice grave concern that proof beyond a reasonable doubt had not been established as to Petitioner Rattenni. (Appendix B at A9, A11).

The judgments of conviction entered against Petitioners arose from the efforts of a senior driver, Peter Hargrove,[2] an employee of Petitioner A-1, to deliver and provide free of charge to New York State Police Troopers quantities of liquors, hams and other merchandise, primarily but not exclusively during the Thanksgiving and Christmas holiday seasons. These items were provided to troopers whose duties included the weighing and ticketing of trucks; distribution of these items principally was the responsibility of Henry G. Leake, a trooper, who often performed this task openly.

Petitioner Rattenni is the president and sole owner of A-1, a Yonkers, New York based trash hauling concern, which operates trucks to transfer trash from customers to upstate dump sites. It was the government's contention at trial that the items were provided as an incentive to avoid ticketing or to lighten the fines imposed upon A-1 trucks, and that Hargrove acted on behalf, and with the active participation, of Petitioners Rattenni and A-1. The defense elicited

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[2] Hargrove, a co-defendant of Petitioners in the district court, did not appeal from the judgment against him.

testimony suggesting that the giving of liquors, hams and turkeys was a common tradition among many regional truckers, that the overall amount of corporate money spent by Hargrove in a discretionary manner was sufficiently small as to escape scrutiny and that, in any event, Hargrove was expected to spend money on liquor and other provisions for dumpsite owners and was responsible for the timely movement of trucks between A-1's Yonkers headquarters and the dumpsites.

In the course of an intensive two year investigation by the Federal Bureau of Investigation ("FBI"), utilizing wiretaps and listening devices, pen registers and body tape recorders, telephotography, informants and cooperating witnesses, Petitioner Rattenni did not appear in a single photograph, was not recorded on a single tape and did not sign documents authorizing funds for goods provided to troopers. At trial, the government principally relied upon Hargrove's out-of-court statements, offered and admitted pursuant to Rule 801(d)(2)(E) as those of a co-conspirator made in the course and in furtherance of a conpiracy. In sum, these statements included:

> (a) a taped conversation in which Hargrove told Trooper Leake that he had mentioned to Rattenni that "this guy that does all these things for me" is retiring and wanted employment with A-1;[3]
>
> (b) a taped conversation in which Hargrove asked Trooper Leake to inquire into a speeding ticket received by the stepson of Rattenni;
>
> (c) a taped conversation in which Hargrove implied to Leake that Rattenni was interested in learning the

---

[3] Such employment never occurred and Hargrove consistently put off requests by Leake to speak or meet with Rattenni.

> status of a suspended trooper whose father's name had appeared on an A-1 Christmas gift list;
>
> (d) testimony by Leake that in 1986, Hargrove had said, "My boss wants to drop off some booze for Christmas for you guys"; and
>
> (e) a post-conspiracy statement of Hargrove (held on appeal to the Second Circuit to have been erroneously admitted as not in furtherance and in the course of the conspiracy, Appendix A at A6) that he was "looking out for the interests of a third party."

(Appendix A at A3)

In the course of oral argument of the defense's dismissal and new trial motions, the district court found that no extrinsic evidence[4] had been adduced as to Rattenni but did not further adjudicate the issue. Discussing the sufficiency of the evidence against Rattenni, the district court stated:

> The defense has separately argued the *Bourjaily* aspect of the case but in fact the two are rather closely related. If the defense is right that there had to be extrinsic proof of the defendant's participation in the conspiracy before the statements made by Hargrove to Leake could be admitted against him for the truth of them, then there is no case against the defendant.

---

[4] Petitioners have adopted the usage by the Second Circuit in its Summary Order of the term "extrinsic evidence", rather than "independent evidence" or "proof *aliunde*", the latter of which was used in *Bourjaily v. United States*, *supra*, 483 U.S. 171, particularly when referring to the analysis set forth in *Glasser v. United States*, 315 U.S. 60 (1942). It is the intent of Petitioners that these terms be considered synonymous.

(Appendix B at A10)

In contrast, the Second Circuit concluded that two items of extrinsic evidence had been presented: "Leake eventually obtained a police-generated driving report on the stepson, which was later found on Rattenni's desk", and "the comptroller of A-1 testified that Rattenni had authorized Hargrove to draw checks in any amount" (Appendix A at A3). The Summary Order omitted any discussion of countervailing proof, including evidence that driving reports were lawfully available to Petitioners through an insurance company and were routinely obtained whenever driving record information was required in connection with an employee, and that the indication of the police origination on the driving record planted by the FBI was highly ambiguous. In characterizing Hargrove's access to A-1 funds as "unfettered" (Appendix A at A6), the Order omitted discussion of testimony by A-1 comptroller Joel Simon[5] that the amount he authorized Hargrove to spend on any particular corporate check was limited by Simon's "common sense", which he exercised in accordance with his belief that Hargrove had reasonable gift and other expenses in connection with his supervision of trucking operations to, and at, the dumpsites.

Reviewing the overall evidence adduced before the district court, the Second Circuit "readily" acknowledged that the case was "relatively close" on its facts (Appendix A at A4). Nevertheless, the Second Circuit affirmed the district court's holding that the evidence was technically sufficient.

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5 Simon was not charged with any violations and was called as a witness by both the prosecution and the defense. Only Simon and Petitioner Rattenni were authorized to sign A-1 checks.

REASONS FOR GRANTING THE WRIT

THIS CASE INVOLVES THE IMPORTANT QUESTION, AS TO WHICH THERE IS A SERIOUS CONFLICT AMONG THE CIRCUITS, OF WHETHER A DISTRICT COURT CAN ADMIT INTO EVIDENCE A CO-CONSPIRATOR'S OUT-OF-COURT STATEMENT WITHOUT ADEQUATE EXTRINSIC EVIDENCE, A QUESTION LEFT UNANSWERED BY THIS COURT IN *BOURJAILY v. UNITED STATES*, 483 U.S. 171 (1987)

In *Bourjaily v. United States*, 483 U.S. 171, 181 (1987), this Court specifically declined to decide "whether the courts below could have relied solely upon ... hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence". Since this Court's decision in *Bourjaily*, many courts have indicated that some quantum of extrinsic evidence is required and that an out-of-court co-conspirator's statement may not achieve its own admission.[6] Some circuit courts have gone further, requiring

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[6] *See, e.g., United States v. Blevins*, 960 F.2d 1252, 1255 (4th Cir. 1992) (court may consider out-of-court co-conspirator's statements sought to be admitted "*in conjunction with other evidence*" [emphasis supplied]); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir. 1988) ("In making these preliminary factual determinations, the court may take into account the proffered out-of-court statements themselves if those statements are sufficiently reliable in light of independent corroborating evidence"); *United States v. Williamson*, 792 F.Supp. 805, 810 (M.D. Georgia 1992) (noting total absence of independent corroborating evidence, court ruled out-of-court co-conspirator's statement inadmissible); *United States v. Giovanelli*, 747 F.Supp. 897, 900 (S.D.N.Y. 1989) (out-of-court statements of co-conspirators may be considered "provided

that the hearsay statements are sufficiently reliable in light of *independent corroborating evidence*" [emphasis supplied]). *See also*, *United States v. McGlory*, 968 F.2d 309, 334-35 (3rd Cir. 1992) (although not reaching the issue, court distinguished Ninth Circuit's decision in *United States v. Mouzin*, 785 F.2d 682 (9th Cir.), *cert. denied*, 479 U.S. 985 (1986), on ground that Ninth Circuit itself recognized in a later Ninth Circuit case, *United States v. Schmidt*, 881 F.2d 608, 613-14 (9th Cir. 1989), that in *Mouzin*, there had been *no extrinsic evidence, at all*, to link the defendant to the conspiracy, thereby precluding admission of the out-of-court statement). *Compare*, *United States v. Devine*, 934 F.2d 1325, 1347 (5th Cir. 1991) ("neither the Supreme Court nor this circuit has addressed the matter" of whether a district court can rely "solely upon the contents of the hearsay statements to determine the existence of a conspiracy or whether the government had to produce independent evidence"), *cert. denied*, __ U.S. __, 112 S.Ct. 954 (1992), *cert. denied sub nom. Robinette v. United States*, __ U.S. __, 112 S.Ct. 911 (1992), *cert. denied sub nom. Martinez v. United States*, __ U.S. __, 112 S.Ct. 952 (1992), *cert. denied sub nom. Milzman v. United States*, __ U.S. __, 112 S.Ct. 1164 (1992), *cert. denied sub nom. Cullum v. United States*, __ U.S. __, 112 S.Ct. 1197 (1992).

Certain state courts, citing *Bourjaily* have likewise retained the requirement that there be some quantum of independent evidence. In *Harjo v. State*, 797 P.2d 338 (Okl.Cr. 1990), the Court of Criminal Appeals of Oklahoma held that, while its state rule of evidence was substantively identical to that of the federal rule and would permit "a trial court [to] consider the statements of an alleged co-conspirator in determining whether the prosecution has made the requisite factual showing", 797 P.2d at 345, the Court explicitly held that "the need for *some quantum of independent evidence* has not been eliminated" [emphasis and bracketed material supplied]. **Id.** at 345 n.3. In 1988, the Supreme Court of Colorado, sitting *en banc*, also adopted the logic of *Bourjaily*, with the proviso that "there must also be *some evidence, independent of the alleged co-conspirator's statement*, establishing that the defendant and the declarant were members of the conspiracy" [emphasis supplied]. *People v. Montoya*, 753 P.2d 729, 736 (Colo. 1988) (en banc). New York has retained its requirement that a co-conspirator's declaration "may be admitted only upon a showing that a prima facie case of conspiracy has been established" and that "the determination whether a prima facie case of conspiracy has been established must be made without recourse to the declarations sought to be introduced". *People v. Bac Tran*, 80 N.Y.2d 170, 179, 589 N.Y.S.2d 845, 850 (1992).

that the extrinsic proof itself must be "fairly incriminating"[7] or "substantial".[8]

In its Summary Order, the Second Circuit explicitly took issue with the Ninth Circuit's holding in *United States v. Silverman*, *supra*, 861 F.2d at 578, which requires that the extrinsic evidence be "fairly incriminating". The Second Circuit held that it need not independently weigh the extrinsic evidence and would only consider it in combination with the co-conspirator statements sought to be admitted (Appendix A at A5).

In holding that extrinsic evidence need not be weighed and evaluated separately from the statements sought to be admitted, the Second Circuit has effectively held that no extrinsic evidence need be provided at all, since a *de minimis* or otherwise insignificant proffer of extrinsic evidence would not prohibit admission of such statements. Accordingly, the Second Circuit's position puts it at odds with decisions of other circuits requiring either some extrinsic evidence or extrinsic evidence that properly might be characterized as "fairly incriminating" or "substantial".[9]

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7 *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988).

8 *United States v. Washington*, 952 F.2d 1402, 1407 (D.C. Cir. 1991), ("statements of 'joint venturers' may be admitted under Rule 801(d)(2)(E), even though no conspiracy is formally charged, if the trial judge finds that there is substantial evidence independent of the statements that a conspiracy existed, that the defendant and the out-of-court declarant were members of the conspiracy, and that the statements were made in furtherance of it"), *cert. denied, sub nom. Jones v. United States*, __ U.S. __, 112 S.Ct. 1773 (1992).

9 By declining to weigh and evaluate the extrinsic evidence apart from the statements sought to be admitted, the Second Circuit has implicitly contradicted its own precedent in *United States v. Daly*, *supra*, 842 F.2d at 1386, which required a showing of independent corroborating evidence against which an out-of-court statement would be checked to determine its reliability. Without a separate evaluation of the extrinsic evidence and a conclusion that it is "substantial", "fairly incriminating", or otherwise probative and non-marginal,

The applicable rule cannot at once require a proffer of extrinsic evidence and yet decline to set forth any standard for its measure. To do so would render the requirement of extrinsic evidence devoid of purpose. Either a minimum standard must be established, or the courts below must be relieved of the requirement altogether. In either case, it is clear that the authoritative guidance of this Court is needed.

In at least one respect, the position of the Second Circuit also runs contrary to the analysis set forth by this Court in *Bourjaily* in justifying a departure from the rule that a conspiracy was to be exclusively established by a preponderance of the extrinsic evidence. In concluding that co-conspirator's statements, albeit presumptively unreliable, may be considered together with extrinsic evidence in determining whether such statements are admissible, this Court placed great emphasis upon the fact that "a piece of evidence, unreliable in isolation, may become quite probative *when corroborated by other evidence*". 483 U.S. at 180 [emphasis supplied]. Were a district court to relinquish its responsiblity to weigh and evaluate the extrinsic evidence apart from the out-of-court statement, the corroborative process would be without value.

Due to the frequency of application of Rule 801(d)(2)(E), a wide disparity of its interpretation among the circuits, and the grave implication of the failure of the rule to serve its essential purpose, review by this Court is warranted. In addition to the applicability of Rule 801(d)(2)(E) in question to a multitude of conspiracy

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there is nothing to be gained by checking the statement against such evidence.

prosecutions,[10] the rule is applicable in civil cases.[11] Interpretation of the rule has further ramifications, insofar as the admission of a statement containing hearsay within hearsay, permissible pursuant to Rule 805, Fed. R. Evid., might itself turn upon a second layer statement of a co-conspirator also found not to be hearsay, pursuant to Rule 801(d)(2)(E), by mere reference to its content and without extrinsic proof.[12] A rule of such common application and grave import, subject to such a diversity of interpretation within the federal circuits, deserves this Court's attention.

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[10] "It is clear that the limited scope of the hearsay exception in federal conspiracy trials is a product, not of the Sixth Amendment, but of the Court's 'disfavor' of 'attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions'". *Dutton v. Evans*, 400 U.S. 74, 82 (1970), *quoting*, *Grunewald v. United States*, 353 U.S. 391, 404. (1957)

[11] *McCormick, Evidence*, Vol.2 (4th ed. 1992) § 259, p. 168.

[12] *See, e.g., United States v. Lenfesty*, 923 F.2d 1293, 1297 (8th Cir. 1992) ("potential additional layer of hearsay would also be excusable as the statements of other co-conspirators").

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Summary Order of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Of Counsel

May 10, 1993

APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of February, one thousand nine hundred and ninety-three.

92-1425
92-1426

PRESENT: HONORABLE JON O. NEWMAN,
HONORABLE ROGER J. MINER,
HONORABLE JOSEPH M. McLAUGHLIN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

NICHOLAS ALFRED RATTENNI, also known as Alfred Nicholas Rattenni and A-1 COMPACTION, INC.,

Defendants-Appellants,

PETER HARGROVE,

Defendant.

STAMP/ United States Court of Appeals
Filed Feb. 10, 1993
Second Circuit

ORDER

Appeal from the United States District Court for the Southern District of New York (Gerard L. Goettel, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of the District Court be and they hereby are AFFIRMED.

Nicholas Alfred Rattenni and A-1 Compaction, Inc. ("A-1") appeal from the July 17, 1992, judgments convicting them of violating 18 U.S.C. §§ 2, 371, and 666(a)(2) (1988). On appeal, Rattenni argues (1) that statements of co-conspirators should not have been admitted against him, (2) that the evidence was insufficient, (3) that prosecutorial misconduct warrants reversal, and (4) that the District Court misapplied the relevant standards in deciding whether to direct an acquittal or order a new trial. A-1 adopts each argument of Rattenni and claims that if the judgment is reversed against Rattenni, it must be reversed as to A-1 as well.

Rattenni is the president and sole owner of A-1 Compaction, Inc., a Yonkers-based garbage company. The indictment charged that A-1, Rattenni, and defendant Peter Hargrove, the senior driver at A-1 in charge of all tractor-trailer operations, conspired to bribe and bribed state troopers who stopped A-1 trucks for suspected violations of state weight and permitting laws. The bribes were intended to influence the troopers to understate the amount the trucks were overweight and thus to write tickets for smaller amounts. The evidence against Hargrove, who does not appeal, was quite strong. He was regularly seen delivering liquor, hams, tires and other

merchandise to the state troopers. Henry Leake, a state trooper who had started cooperating with the Government while the conspiracy was continuing, testified that the gifts were given on the explicit understanding that the troopers would write "light" tickets.

The Government presented less substantial evidence against Rattenni. This evidence consisted of five series of co-conspirator statements and two items of extrinsic evidence. First, an FBI agent testified that when interviewed in 1990, Leake stated that when Hargrove had first offered Leake merchandise in 1986, Hargrove had stated, "My boss wants to drop off some booze for Christmas for you guys." Second, in a taped conversation, Hargrove indicated to Leake that Rattenni was interested in the reinstatement of a suspended state trooper whose father was a customer of A-1. Third, in a taped conversation, Hargrove stated that he had told Rattenni that Leake was interested in employment with A-1 after his state police employment, and that though Rattenni did not know Leake's name, Rattenni knew of Leake as "this guy that does all these things for us" and as a trooper to whom Hargrove had once supplied a vehicle engine at a substantial discount. Fourth, an FBI agent testified that after his arrest Hargrove stated that he was "looking out for the interests of a third party." Fifth, Hargrove asked Leake to inquire into a speeding ticket received by Rattenni's stepson. Sixth, Leake eventually obtained a police generated driving report on the stepson, which was later found on Rattenni's desk. Seventh, the comptroller of A-1 testified that Rattenni had authorized Hargrove to draw checks in any amount.

Hargrove testified in his own defense, claiming that he had been extorted and entrapped. Rattenni did not testify. Although the District Court expressed some hesitation about allowing the case to go to the jury, he concluded that a rational juror could find beyond a reasonable doubt that Rattenni had committed the charged offenses. The jury found Hargrove, Rattenni and A-1 guilty on both counts of the indictment. Judge Goettel denied post-trial motions

and sentenced Rattenni to found months' imprisonment to be followed by two years' supervised release and fine of $20,000. A-1 was fined $40,000.

1. Rattenni makes two challenges to the sufficiency of the evidence. He first argues that the evidence was insufficient to show that he was a member of the conspiracy or an aider or abetter. While we readily agree that this was a relatively close case, we conclude that, viewing all the evidence in the light most favorable to the Government, a rational juror could find beyond a reasonable doubt that Rattenni was a member of the conspiracy and aided in the commission of the substantive offenses. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We have no doubt that Rattenni benefited from the scheme and that a conspiracy involving Hargrove and state troopers was established. "Once a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990). A reasonable inference, available to the jury, was that Rattenni deliberately tried to avoid learning details of the scheme and took a hands-off approach. Hargrove's statements, however he may now try to explain them, support the further inference that Rattenni knew of the scheme in general terms, and the comptroller's testimony supports the inference that Rattenni facilitated the scheme by making funds available to Hargrove.

Second, Rattenni claims that 18 U.S.C. § 666 requires an intent to pay bribes and that the Government established, at most, an intent to pay mere gratuities. See *United States v. Jackowe*, 651 F. Supp. 1035 (S.D.N.Y. 1987). We need not determine whether section 666 reaches the giving of gratuities, however, since we find the evidence sufficient to show that the conspiracy had as its object the giving of bribes. As opposed to the giving of a gratuity, bribery requires the additional element of "corrupt intent," i.e., an intent to influence an official act. See *United States v. Irwin*, 534 F.2d 192, 196 (2d Cir.

1965), *cert denied*, 383 U.S. 967 (1966). The troopers in this case were provided with merchandise on the explicit understanding that they would understate the amounts that A-1 trucks were overweight and write tickets for smaller amounts. This evidence amply demonstrated Hargrove's corrupt intent, and, as we have indicated, the evidence was also sufficient to demonstrate Rattenni's knowledge of and participation in Hargrove's activities.

2. Rattenni argues that Hargrove's and Leake's statements were hearsay and should not have been admitted against him. We initially observe that the statements concerning the suspended trooper, Leake's retirement, and the stepson's speeding ticket were not offered for their truth, but to show Rattenni's knowledge of the relationship between Hargrove and Leake. To the extent that these statements were offered for their truth, Fed. R. Evid 801(d)(2)(E) provides that statements by a co-conspirator during the course of and in furtherance of the conspiracy are not hearsay. Rattenni argues that there was inadequate extrinsic evidence of a conspiracy and that the statements were not in furtherance of the conspiracy.

In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Supreme Court held that statements are admissible under Fed. R. Evid. 801(d)(2)(E) if the trial judge finds by a preponderance of the evidence that a conspiracy existed and that the person against whom the statements are admitted was a member of the conspiracy. *Id.* at 175-176. In making this determination, the trial judge may consider the content of the statements themselves. *Id.* at 176-180. Although the Ninth Circuit has indicated that the extrinsic evidence must be "fairly incriminating" since the co-conspirator's statement itself is presumptively unreliable, see *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988), we do not require the District Court to weigh the extrinsic evidence independently of the co-conspirator statements. See *United States v. Cota*, 953 F.2d 753, 759 (2d Cir. 1992).

In this case, the District Court had before it some extrinsic evidence of Rattenni's participation in the conspiracy: the fact that the driving record wound up on Rattenni's desk and the testimony of the comptroller that Rattenni had given Hargrove unfettered access to A-1 funds. Adding to this extrinsic evidence the content of the statements themselves, we find that the District Court was not clearly erroneous in finding by a preponderance of the evidence that Rattenni had been a member of the conspiracy.

We also find that the District Court was not clearly erroneous in finding by a preponderance of the evidence, see *United States v. Long*, 917 F.2d 691, 700-701 (2d Cir. 1990), that Hargrove's statement that his "boss" wished to supply the troopers with liquor was in furtherance of the conspiracy. The indictment charged a conspiracy to influence the "ticketing of garbage trucks and other vehicles," and this statement involved a method of conducting the conspiracy. However, we agree with Rattenni that Hargrove's post-arrest statement should not have been admitted for its truth because it was neither in furtherance of nor during the course of the conspiracy. Nevertheless, we are convinced that the error was harmless. Rattenni was identified by name in several of Hargrove's properly admitted statements. The addition of one additional statement making an oblique reference to a "third-party" was not significant.

3. Rattenni next argues that misconduct in the prosecutor's rebuttal summation requires a new trial. The prosecutor argued that Hargrove was a liar and could not be believed in his testimony that Rattenni had not known of the bribery scheme, and specifically stated that "[a]lthough Peter Hargrove tells you he and Nick Rattenni haven't discussed it yet, you can be sure that Nick Rattenni will have something to do with Peter Hargrove's legal fees." On cross-examination, Hargrove had indicated that Rattenni and he had had no conversations about attorney's fees "yet." While the prosecutor was entitled to inquire into fee arrangements as evidence

of bias and to remind the jury of Hargrove's response, as indicating his expectation of fee reimbursement, the evidence did not support an argument that Rattenni had agreed to pay the fee. It was inappropriate for the prosecutor to say that the jury could "be sure" that a fee arrangement would be made. Nevertheless, we do not consider this isolated incident in a lengthy trial a "flagrant abuse" justifying reversal. See *United States v. Perez*, 702 F.2d 33, 37 (2d Cir.) (quoting *United States v. Perry*, 643 F.2d 38, 51 (2d Cir. 1981)), *cert. denied*, 462 U.S. 1108 (1983).

4. Rattenni claims that once Judge Goettel indicated his own view that the evidence did not establish guilt beyond a reasonable doubt, he was obligated, at a minimum, to order a new trial. While a District Court has discretion to grant a new trial "in the interest of justice," that discretion should be exercised only in cases of "manifest injustice," where there is "a real concern that an innocent person may have been convicted." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). Judge Goettel properly ruled that the conspiracy had been established by a preponderance of the evidence and that a rational juror could find guilt beyond a reasonable doubt. No abuse of discretion occurred in declining to order a new trial.

5. Because we affirm the judgment as to Rattenni, we do not reach the corporate defendant's claim that the judgment against it cannot stand without the conviction of Rattenni.

s/ Jon O. Newman
s/Roger J. Miner
s/Joseph M. Mclaughlin
Circuit Judges

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
S91 CR. 282 (GLG)

- V. -

ALFRED NICHOLAS RATTENNI
PETER HARGROVE
A-1 COMPACTION

U.S. Courthouse
White Plains, N.Y.
July 2, 1992
12:30 a.m.

TRANSCRIPT OF POST-TRIAL MOTIONS BEFORE THE HONORABLE GERALD L. GOETTEL UNITED STATES DISTRICT JUDGE

For the Government:
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United States Attorney
Southern District of New York
BY: CHRISTOPHER REYNOLDS
Assistant U.S. Attorney

For the Defendants:
VINCENT LANNA, ESQ.
EDWARD PANZER, ESQ.

Court Reporter:
SUE GHORAYEB, R.P.R., C.S.R.
101 E. Post Rd., Rm. 27
White Plains, N.Y. 10601

Proceedings recorded by mechanical stenography, transcript produced by C.A.T.

* * *

As I indicated at the conclusion of the evidence and indeed at the conclusion of the Government's case, I thought the case against Rattenni was extremely slim. I believed and I think any reasonable juror could conclude that he had some generalized knowledge of what Hargrove was doing but I found it difficult to say, had I been a juror, that I would have found beyond a reasonable doubt that he had sufficient knowledge of the existence of the scheme and its functions to have joined and participated in it.

The case, however, went to a jury, a reasonable jury, and 12 reasonable men and women found that he did.

It is true that one of them—I think one of the more intelligent jurors—subsequently wrote a letter indicating that she had grave doubts in that regard but the critical issue here is the extent to which a District Judge can invoke his own fact finding in contravention to what a jury has done.

The cases in this circuit are particularly emphatic and clear. Trial courts must view the evidence in the light most favorable to the Government at this posture. The trial court should not substitute its own determination of the credibility of the witnesses, the weight of

the evidence, and the reasonable inferences to be drawn for that of the jury. The verdict must stand if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

This was not tremendously a credibility case. What Hargrove said to Leake is on tape and can't be denied. It is true Hargrove took the stand and as to few matters he acknowledged saying them but said, in effect, it really wasn't so, he was just talking for Leake's benefits. And I suppose that is a very small area of credibility but this is not essentially a witness credibility case.

Consequently, I don't see any basis for considering a motion for new trial. Either there is or is not sufficient evidence. And then we turn to the Court's powers to overturn the findings of what I believe to be a jury of reasonable peers of the defendant against him.

The defense has separately argued the Bourjaily aspect of the case but in fact the two are rather closely related. If the defense is right that there had to be extrinsic proof of the defendant's participation in the conspiracy before the statements made by Hargrove to Leake could be admitted against him for the truth of them, then there is no case against the defendant.

Bourjaily seems to indicate to the contrary. This circuit has not worked its way around Bourjaily, although a couple of other circuits have put some limitations on it. I do believe that in certain respects, some of the things that Hargrove said to Leake were not truthful and were said just for the point of keeping Leake pacified.

* * *

The long and the short of it is, either the jury was unreasonable or I am unreasonable. I have tried to determine why the jury rendered the verdict that it did in this case in light of my view of the evidence.

In the 20 some odd years that I have been in the federal courts, I have seen a number of guilty defendants acquitted. I have never seen an innocent defendant convicted. I don't mean to suggest that this defendant is necessarily innocent but I am suggesting that perhaps proof beyond a reasonable doubt was not presented.

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JUL 12 1993
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(2)

No. 92-1795

In the Supreme Court of the United States

OCTOBER TERM, 1993

NICHOLAS ALFRED RATTENNI AND
A-1 COMPACTION, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
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QUESTION PRESENTED

Whether the district court erred in admitting at trial statements of petitioners' co-conspirators.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is unreported, but the judgment is noted at 990 F.2d 1250 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1993. The petition for a writ of certiorari was filed on May 11, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to commit bribery, in violation of 18 U.S.C. 371, and bribery, in violation of 18 U.S.C. 666. Nicholas Rattenni was sentenced to four months' imprisonment, to be followed by four months' home confinement and two years' supervised release, and was fined $20,000. A-1 Compaction, Inc., was fined $40,000. The court of appeals affirmed. Pet. App. A1-A7; Gov't C.A. Br. 2.

1. Nicholas Rattenni is the president and owner of A-1 Compaction, Inc., a garbage hauling company. Peter Hargrove is a senior A-1 employee whom Rattenni had authorized to draw checks on the company's account. Between 1986 and 1990, Hargrove delivered liquor, hams, tires, and other merchandise to New York state troopers. Those items were distributed on the understanding that troopers who stopped A-1 trucks for violations of state truck weight regulations would understate the amount by which the trucks were overweight and would write tickets for the smaller amounts. Pet. App. A2-A3; Gov't C.A. Br. 3-8.

2. At petitioners' trial, the government introduced several out-of-court statements made by Hargrove and by Henry Leake, a trooper who accepted bribes from Hargrove and who began cooperating with the government during the course of the conspiracy. Those statements showed that Rattenni knew about and participated in the bribery scheme. First, Leake stated during an FBI interview that when Hargrove initially offered Leake merchandise in 1986, Hargrove said, "My boss wants to drop off some booze for

Christmas for you guys." Second, Hargrove told Leake in a recorded conversation that Rattenni was interested in the reinstatement of a suspended state trooper who was the son of an A-1 customer. Third, Hargrove stated in another recorded conversation that he had told Rattenni that Leake was interested in employment with A-1 and also stated that Rattenni knew of Leake as "this guy that does all these things for us" and knew that Hargrove had supplied Leake with a vehicle engine at a substantial discount. Fourth, Hargrove asked Leake to inquire about a speeding ticket received by Rattenni's stepson. Leake eventually gave Hargrove a copy of a police report on the stepson's driving record. The report was later found on Rattenni's desk. Finally, after his arrest, Hargrove stated that he was "looking out for the interests of a third party." Pet. App. A3; Gov't C.A. Br. 3-11.

3. The court of appeals affirmed petitioners' convictions, rejecting their claim that the statements by Hargrove and Leake were improperly admitted under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). The court first observed that Hargrove's statements concerning the suspended trooper, Leake's retirement, and the speeding ticket were not hearsay, because they "were not offered for their truth, but to show Rattenni's knowledge of the relationship between Hargrove and Leake." Pet. App. A5. The court of appeals then concluded that to the extent that any of the statements were offered for their truth, the district court properly admitted them under Rule 801(d)(2)(E). Pet. App. A5-A6. The court noted that independent evidence, apart from those statements, supported a finding that Rattenni participated in a conspiracy.

Specifically, the court identified the presence on Rattenni's desk of the police report Hargrove had obtained from Leake and the fact that Rattenni had given Hargrove unrestricted access to A-1 funds. Pet. App. A6. The court concluded that "[a]dding to this extrinsic evidence the content of the statements themselves, * * * the District Court was not clearly erroneous in finding by a preponderance of the evidence that Rattenni had been a member of the conspiracy." *Ibid.*[1]

ARGUMENT

A co-conspirator's out-of-court statement is admissible at trial under Federal Rule of Evidence 801(d)(2)(E) if the government shows by a preponderance of the evidence that a conspiracy existed between the declarant and the defendant and that the statement was made during the course of, and in furtherance of, the conspiracy. *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987). In determining whether a conspiracy existed and whether the defendant took part in the conspiracy, the district court

[1] The court of appeals also rejected petitioners' claims regarding the sufficiency of the evidence, alleged prosecutorial misconduct, and the district court's refusal to order a new trial. Pet. App. A4-A7. The court of appeals ruled that the district court erred in admitting Hargrove's post-arrest statement that he had been protecting the interests of a third party, concluding that the statement was not made in furtherance of or during the course of the conspiracy. *Id.* at A6. The court concluded, however, that in light of the fact that "Rattenni was identified by name in several of Hargrove's properly admitted statements," the erroneous admission of one additional statement containing an "oblique reference" to a third party was harmless. *Ibid.*

may evaluate all non-privileged evidence, including the statement sought to be admitted. *Id.* at 176-181.

The court of appeals correctly concluded that the government made an adequate showing that Rattenni participated in a conspiracy. The statements themselves strongly suggested that Rattenni knew of and directed the bribery scheme. In addition, as the court of appeals observed, independent evidence supported the finding that Rattenni was a member of the conspiracy. As the president and owner of A-1, Rattenni directly benefited from the practice of bribing troopers to give A-1 favorable treatment. The presence on Rattenni's desk of the police report Leake obtained for Hargrove provided additional support for the inference that Rattenni knew of Hargrove's contacts with Leake, and the evidence that Rattenni gave Hargrove unrestricted access to A-1 funds suggested that Rattenni facilitated the scheme by making company funds available to Hargrove. In sum, the court of appeals correctly held that the district court did not err in finding that Rattenni participated in the conspiracy. Further review of that factbound question is not warranted.

Petitioners contend (Pet. 10-14) that this Court should review an issue left open in *Bourjaily*: whether a district court may rely solely on the substance of a co-conspirator's out-of-court statements to determine the admissibility of those statements under Rule 801(d)(2)(E). See *Bourjaily*, 483 U.S. at 181. Because the government did not rely on the co-conspirator statements alone to establish Rattenni's involvement in the conspiracy to bribe state troopers, the court of appeals did not address the question on which petitioners seek review. See Gov't C.A. Br. 20-23. Instead, the court held that the proffered state-

ments and the extrinsic evidence, taken together, were sufficient to show that Rattenni participated in the conspiracy. See Pet. App. A6. Thus, the question left open in *Bourjaily* is not presented here.

Petitioners contend (Pet. 12) that the court of appeals' unpublished decision in this case conflicts with *United States* v. *Silverman*, 861 F.2d 571 (9th Cir. 1988), and *United States* v. *Washington*, 952 F.2d 1402 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1773 (1992). Contrary to petitioners' suggestion, the Ninth Circuit did not hold in *Silverman* that Rule 801(d)(2)(E) requires a district court to evaluate the extrinsic evidence separately to determine whether it establishes the defendant's participation in the alleged conspiracy. Instead, that court concluded on the facts before it that "when the additional evidence is assessed in light of [the co-conspirator] statements, a preponderance of the evidence fails to demonstrate that [the defendant] knew of and participated in the alleged conspiracy." 861 F.2d at 580. The court also stated that evidence used to support the admission of co-conspirator statements must be "fairly incriminating," *id.* at 578, but it is not clear that the evidence at petitioners' trial would fail to satisfy that description. See Pet. App. A5-A6.[2]

Petitioners' reliance on *United States* v. *Washington*, *supra*, is also misplaced. In that case, the court

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[2] The court of appeals observed that "the Ninth Circuit has indicated that the extrinsic evidence must be 'fairly incriminating' since the co-conspirator's statement itself is presumptively unreliable, see *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988)." Pet. App. A5. Nevertheless, the court of appeals found it unnecessary to "require the District Court to weigh the extrinsic evidence independently of the co-conspirator statements." *Ibid.*

merely held that even if a defendant is not charged with conspiracy, out-of-court statements may be admitted under Rule 801(d)(2)(E) if there is "substantial evidence independent of the statements" to support a finding that a conspiracy existed between the defendant and the declarant. 952 F.2d at 1407. In this case, Rattenni and A-1 were charged with conspiring to bribe state troopers, and *Washington* accordingly is inapposite. The court of appeals correctly found that there was sufficient evidence—including evidence independent of the co-conspirator statements—to establish that Rattenni participated in that conspiracy. There is no reason to believe that the District of Columbia Circuit would have reached a different result.[3]

[3] Petitioners also contend (Pet. 12 n.9) that the court of appeals' decision "implicitly contradict[s]" the decision in *United States* v. *Daly*, 842 F.2d 1380 (2d Cir.), cert. denied, 488 U.S. 821 (1988). That claim is mistaken. In *Daly*, the Second Circuit employed the same approach to co-conspirator statements that it followed in this case, evaluating the proffered statements "in light of independent corroborating evidence." 842 F.2d at 1386. In any event, petitioners' claim of an intra-circuit conflict does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

NINA GOODMAN
Attorney

JULY 1993

(3)

92-1795

No._____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1992

NICHOLAS ALFRED RATTENNI,
also known as Alfred Nicholas Rattenni and
A-1 COMPACTION, INC.,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY MEMORANDUM

In its opposing brief in No. 92-1795, the United States mischaracterizes, in three principal respects, the thrust of petitioners' arguments as well as the holding of the Second Circuit in the matter *sub judice*.

First, the Solicitor General argues: "Petitioners contend (Pet. 12) that the court of appeals' unpublished decision in this case conflicts with *United States v. Silverman*, 861 F.2d 571 (9th Cir. 1988) and *United States v. Washington*, 952 F.2d 1402 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1173 (1992)." Brief in Opp., p.6. The fact of conflict is one articulated by the Second circuit, not merely by petitioners. The Second Circuit wrote:

> Although the Ninth Circuit has indicated that the extrinsic evidence must be "fairly incriminating" since the co-conspirator's statement itself is presumptively unreliable, see *United States v. Silverman*, 861 F.2d 571 (9th Cir. 1988), we do not require the District Court to weigh the extrinsic evidence independently of the co-conspirator statements. See *United States v. Cota*, 953 F.2d 753, 759 (2nd Cir. 1992).

Pet. App. A5

Crystal clarity as to the enormous difference between the approach of the Second And Ninth Circuits is available only by careful review of *Silverman*. Within the jurisdiction of the Ninth Circuit, district courts may not cease analysis upon receipt of "some evidence" independent of the proferred co-conspirator's statements (861 F.2d at 577-78), in contrast to district courts within the jurisdiction of the Second Circuit. Rather, in the Ninth Circuit, a district court must further determine whether such extrinsic evidence is itself "fairly incriminating." As *Silverman* specifies, "evidence of conduct that is completely consistent with defendant's unawareness of the conspiracy" is insufficient (861 F.2d at 578).

Second, the Solicitor General asserts: "Contrary to petitioners' suggestion, the Ninth Circuit did not hold in *Silverman* that Rule 801(d)(2)(E) requires a district court to evaluate the extrinsic evidence separately to determine whether it *establishes* the defendant's participation in the conspiracy." (Brief in Opp., p.6 [emphasis added]). The foregoing misstates the position of petitioners, for it suggests that petitioners argue that the state of the law is now as it was prior to this Court's decision in *Bourjaily v. United States* 483 U.S. 171 (1987). Rather, petitioners "suggest" only that the nature and rigor of the analysis applied by district courts to the "corroborating" evidence now varies from circuit to circuit.

Bourjaily clarified that a co-conspirator's out-of-court statement should be included in a district court's assessment of whether the statement should be admitted to evidence. The Court specifically

refrained from passing on whether that statement could be admitted without any proffer of independent, corroborating evidence. If it is assumed, as do several circuits, that "some" extrinsic evidence is required, the question necessarily remains as to *how* probative such must be of a co-conspirator's participation in the conspiracy, else the evidence be without value and the additional requirement serve no purpose. Further, even if the force of logic does not compel this separate procedure, the Ninth Circuit, among other courts, holds that such is required. In contrast, the Second Circuit plainly has asserted that it will not weigh the independent evidence, so long as there is a proffer of "some" evidence. The Ninth Circuit will not abide this, holding that the independent evidence must be "fairly incriminating" and that evidence consistent with non-participation will not suffice.

Third, the Solicitor General bemoans the fact that here, there is some independent evidence, and consequently there is no issue presented. ("Because the government did not rely *solely* on the co-conspirator statements alone to establish Rattenni's involvement in the conspiracy to bribe state troopers, the court of appeals did not address the question on which petitioners seek review." Brief in Opp., p.5 [emphasis added]). However, the point is that such evidence would not have sufficed, we submit, under the scrutiny applied by the Ninth Circuit, nor would it have fared better under the "substantial" evidence test of the District of Columbia Circuit. It is only due to the Second Circuit's analytic indifference to the quantum or character of the independent evidence that judgment was affirmed.

CONCLUSION

For the reasons set forth above and in the petition, a writ of certiorari should issue to review the Summary Order of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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